

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: _____

Meeting Type: Regular

Meeting Date: Dec 18, 2014

Action Requested By: _____

Agenda Type: Resolution

Subject Matter:

Resolution consenting to the approval of settlement agreement in Dawson Building Contractors lawsuits.

Exact Wording for the Agenda:

Resolution consenting to the approval of a settlement agreement among the Public Building Authority, Dawson Building Contractors, Inc., Zurich North America Insurance Company, and Bibler Masonry, Inc.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: _____

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: _____



Date: Dec 18, 2014

RESOLUTION NO. 2014-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby, authorized to execute that Settlement Agreement (for the sole purpose of evidencing the City of Huntsville's consent to, and approval of, the Settlement Agreement) by and among the Public Building Authority of the City of Huntsville, Alabama, Dawson Building Contractors, Inc., Bibler Masonry, Inc., and Zuirch American Insurance Company, which said Agreement is substantially in words and figures similar to that certain document attached hereto and identified as "Pro Tanto Settlement Agreement and Mutual Release," consisting of sixteen (16) pages, with the date of December 18, 2014, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council. An executed copy of said document, after being signed by the Mayor, shall be permanently kept on file in the Office of the City-Clerk Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 18th day of December, 2014.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 18th day of December, 2014.

Mayor of the City of Huntsville,
Alabama

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

| | | |
|--|---|---------------------------------|
| DAWSON BUILDING CONTRACTORS, INC., |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No.: 2006-1887-DSP |
| |) | |
| THE PUBLIC BUILDING AUTHORITY OF |) | |
| THE CITY OF HUNTSVILLE, ALABAMA, <i>et</i> |) | |
| <i>al.</i> , |) | |
| Defendants. |) | |

Consolidated With

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

| | | |
|------------------------------------|---|---------------------------------|
| THE PUBLIC BUILDING AUTHORITY OF |) | |
| THE CITY OF HUNTSVILLE, ALABAMA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No.: 2006-1943-KKH |
| |) | |
| DAWSON BUILDING CONTRACTORS, INC., |) | |
| <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

PRO TANTO SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Pro Tanto Settlement Agreement and Mutual Release ("Agreement"), consisting of 16 pages, is lawfully created and executed by and between Bibler Masonry, Inc. ("Bibler"), the Public Building Authority of the City of Huntsville, Alabama, and the City of Huntsville, Alabama (collectively "PBA"), Zurich American Insurance Company and American Guarantee & Liability Insurance Company (collectively "Zurich") and Dawson Building Contractors, Inc. ("Dawson")

(collectively, "Parties"), the effective date of which shall be the latest date appearing on the signature pages of this Agreement ("Effective Date").

RECITALS

A. WHEREAS, the PBA undertook to build a detention facility in Huntsville, Alabama; and

B. WHEREAS Dawson served as the general contractor on the construction project for the detention facility (the "Project") for a portion of time; and

C. WHEREAS, Bibler was one of the suppliers of goods and services to Dawson on the Project; and

D. WHEREAS, Bibler was insured by Zurich Americas Insurance Company and American Guarantee & Liability Insurance Company under policies of insurance with policy numbers GLO 9376691; AUC 9301220 (the "Policies"); and

E. WHEREAS, a dispute arose regarding the Project among the Parties; and

F. WHEREAS, the dispute resulted in the filing of claims and two lawsuits in Madison County Circuit Court styled as *Dawson Building Contractors, Inc., v. The Public Building Authority of the City of Huntsville, et al.*, Case No. CV-06-1887-LWH and *The Public Building Authority of the City of Huntsville, Alabama, v. 2 WR/Homes-Wilkins Architects, Inc., et al.*, Case No. CV-06-1943 (the "Project Litigation"); and

G. WHEREAS, Dawson claimed it was owed a defense and indemnity from Zurich as an additional insured under the Policies pursuant to Dawson's contract with Bibler and the Policies; and

H. WHEREAS, the Parties wish to resolve the PBA's claims against Bibler, Dawson's claims against Zurich and Bibler, and Bibler's claims against the PBA and Dawson, including its

claim against the bond issued on behalf of Dawson by St. Paul Fire and Marine Insurance Company (“St. Paul”).

W I T N E S S E T H:

NOW, THEREFORE, in consideration of the premises and covenants contained in this Agreement, and other good and valuable consideration, the Parties agree as follows:

1. Recitals. The Parties acknowledge, represent, and declare that the recitals set forth above are true and correct to the best of their knowledge and belief.

2. Payment of Settlement Funds. Zurich, on behalf of Bibler and on its own behalf, in consideration of the mutual release by the PBA and Dawson of Zurich and Bibler, and other good and valuable consideration, as set forth in this Agreement, , and pay the total sum of **ONE MILLION, FIVE HUNDRED THOUSAND DOLLARS** and 00/100 (\$1,500,000.00) (“the Settlement Funds”), the sufficiency of which is expressly acknowledged by the PBA and Dawson. Payment of the Settlement Funds shall be made within a reasonable time not to exceed fifteen days (15) after approval by the Huntsville City Council (“Council”) and execution of the required release. Such payment shall be by check or wired funds made payable, unless otherwise directed by the PBA and Dawson, to Upchurch, Watson, White and Max, to be held in its trust fund (“Trust Fund”) for the benefit of the PBA and Dawson, to be distributed and allocated by, among, and between the PBA and Dawson, at their sole discretion, if they are able to reach agreement, or as directed by the Court at the conclusion of the Project litigation.

3. City Council Approval Required. The settlement between and among the Parties memorialized by this Agreement is expressly subject to and contingent upon approval by the PBA and the Council at a regularly-scheduled public meeting. As such, the Parties’ obligations under this

Agreement shall not be deemed final, operative, binding, or enforceable until such time as the PBA and the Council, in the manner required by law and the Council by majority vote, pass a resolution approving the settlement. In the event the Council or the PBA declines to approve the settlement, the Agreement is null and void in all respects and is not admissible in the Project Litigation or any other litigation related to the Project or the disputes contained in the Project Litigation.

4. **Denial of Liability or Wrongdoing.** The Parties understand and agree that this is a settlement and compromise of doubtful and disputed claims and is not to be considered any admission of liability by any of them. To the contrary, it is understood and agreed that each of the Parties generally denies any and all liability to any other of the Parties, and specifically denies the validity of all adverse claims in the Project Litigation.

5. **Release.**

a. **Bibler**, in consideration of the release provided by the **PBA**, hereby releases, remises, acquits, and forever discharges the **PBA**, and, as applicable, each of its employees, co-employees, agents, representatives, and attorneys; each of its boards, authorities, commissions, committees, and departments; each of its elected or appointed officials, supervisors; and each of its liability and other insurance carriers (but only as to coverage provided to the **PBA**), and any other person or entity acting by or through the **PBA**, of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that **Bibler** has or may have in its individual or representative or official capacities, whether known or unknown, concealed or hidden, suspected or unsuspected, against the **PBA**, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective

Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the Project Litigation.

b. **Bibler**, in consideration of the release provided by **Dawson**, hereby releases, remises, acquits, and forever discharges **Dawson**, and, as applicable, each of its parent, subsidiary, and affiliated companies; each of its predecessors, successors, officers, directors, and partners, employees, co-employees, agents, representatives, and attorneys; each of its liability and other insurance carriers (but only as to coverage provided to Dawson on this Project); each of its sureties on any bond, specifically including, but not limited to, **St. Paul** (but only as to bonds provided for the Project); and each of its parent, subsidiary, and affiliated companies, each of its predecessors, successors, officers, directors, and partners, employees, co-employees, agents, representatives, attorneys, and any other person or entity acting by or through **Dawson**, of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that **Bibler** has or may have in its individual or representative or official capacities, whether known or unknown, concealed or hidden, suspected or unsuspected, against **Dawson**, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the Project Litigation.

c. The **PBA**, in consideration of the payment of the Settlement Funds and the release provided by **Bibler**, hereby releases, remises, acquits, and forever discharges **Bibler**, and, as applicable, each of its parent, subsidiary, and affiliated companies; each of its predecessors, successors, officers, directors, and partners, employees, co-employees, agents, representatives,

attorneys; its liability insurer, specifically **Zurich**, and other insurance carriers (but only as to coverage provided to **Bibler**); and each of its sureties on any bond on behalf of **Bibler**, of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that the **PBA** has or may have in its individual or representative or official capacities, whether known or unknown, concealed or hidden, suspected or unsuspected, against **Bibler** arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the Project Litigation, except as specifically limited in Paragraph 6 of this Agreement.

d. **Dawson**, in consideration of the payment of the Settlement Funds, assignment of claims and the release provided by **Bibler**, hereby releases, remises, acquits, and forever discharges **Bibler**, and, as applicable, each of its parent, subsidiary, and affiliated companies; each of its predecessors, successors, officers, directors, and partners, employees, agents, representatives, and attorneys; each of its liability and other insurance carriers, including **Zurich** and any other of **Bibler's** other insurers (but only as to coverage provided to **Bibler**); each of its sureties on any bond, with respect to liability for **Bibler** only; and any other person or entity acting by or through **Bibler**, of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that **Dawson** has or may have in its individual or representative or official capacities, whether known or unknown, concealed or hidden, suspected or unsuspected, against **Bibler** arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past

through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the Project Litigation, except as specifically limited or otherwise related to matters in Paragraphs 6 and 7 of this Agreement.

6. Notwithstanding any release language above, **Bibler** expressly retains its claims against its subcontractor, **Commercial Masonry, Inc. ("CMI")**, and any liability or other insurer of **CMI** ("Retained Claims"). **Bibler** and **Zurich** jointly and severally agree to defend, indemnify and completely hold harmless the **PBA**, **Dawson**, and, as applicable, each of their employees, co-employees, agents, representatives, attorneys; each of their boards, authorities, commissions, committees, and departments; each of their elected or appointed officials, supervisors; and any other person or entity acting by or through the **PBA**; their agents, former agents, owners, parent corporations, sister companies, parent companies, affiliates, affiliated companies, owners, bond companies, servants, stockholders, subsidiaries, employees, officers, directors, partnerships, executors, administrators and assigns; and any other person or entity acting by or through **Dawson**, against any claims, damages, expenses, lawsuits, costs, or demands relating to or arising out of the Retained Claims. This indemnity and hold harmless provision covers damages including, but not limited to, attorneys' fees and other reasonable expenses following reasonable notice and demand under this agreement to **Bibler** and **Zurich**, directly, or to their attorney(s) in the Project Litigation.

7. As part of the consideration for this Agreement, and notwithstanding any other language in this Agreement, **Bibler** hereby assigns to **Dawson** any and all claims **Bibler** has against any individual and/or entity related to the Project and/or Project Litigation, and **Zurich** hereby assigns to **Dawson** any and all claims **Zurich** has against any individual and/or entity related to or arising out of **Bibler's** work on the Project, the Project Litigation and/or the Policies ("Assigned Claims").

Nothing herein shall be construed to mean that Zurich is assigning claims related to work of other entities on the Project or other policies related to the Project. Bibler and Zurich make no promise, guarantee, warranty or representation of any kind, except as otherwise stated in this Agreement, as to 1) the assignability of the Assigned Claims, and/or 2) the viability of or amount of the Assigned Claims, and/or 3) any other aspect of the Assigned Claims not stated herein. Bibler and Zurich represent and warrant that they have not previously assigned, limited, or released the claims referenced in this Paragraph. Bibler and Zurich agree not to take any action to compromise the Assigned Claims. Bibler agrees that it will make reasonable efforts upon a timely request by Dawson to comply with any requests for assistance in prosecuting the Assigned Claims. Payments for expenses, including travel, lodging, meals and employee time will be made in advance of any efforts requested of Bibler. Dawson acknowledges and agrees that it may not bring any of the assigned claims in the name of Bibler or Zurich.

8. No Assignment of Claims; No Right of Subrogation. The Parties expressly represent and warrant that no claims assigned or released by them in this Agreement have previously been assigned to any other person or entity. The PBA and Dawson each expressly represents and warrants that no other person or entity, including, but not limited to, St. Paul and Amerisure, has any subrogation right to the claims it released in this Agreement.

9. Dismissal of Claims on a Pro Tanto Basis. As soon as practicable, the Parties will take all actions necessary to effect the prompt dismissal, with prejudice, of their claims against each other in the Project Litigation, with costs (including attorneys' fees) taxed as paid.

10. Attorneys' Fees. If it becomes reasonably necessary for any of the Parties to retain counsel for the purpose of enforcing or preventing the breach of any provision of this Agreement,

including, but not limited to, instituting any action or proceeding to enforce any of its provisions for damages by reason of any alleged breach of any of its provisions, or for a declaration of rights or obligations under it, or for any other judicial remedy, then, if this matter is settled in favor of one or more of the Parties by judicial determination (which term includes arbitration judicially affirmed), the substantially prevailing Party or Parties (whether at trial or on appeal) shall be entitled, in addition to such other relief as may be granted, to be reimbursed by the breaching party for all costs and expenses incurred by it or them, including, but not limited to, reasonable attorneys' fees.

11. Applicable Law. This Agreement is deemed created and executed within the state of Alabama, and is to be governed, construed, interpreted, and enforced in accordance with the laws of the state of Alabama.

12. Binding Agreement. This Agreement shall be binding upon, and shall inure to the benefit of, the Parties, and, as applicable, their respective heirs, representatives, successors, agents, employees and/or assigns.

13. Voluntary Agreement. The Parties represent and warrant that they have each carefully read this Agreement and completely understand its terms, conditions, and effect. Additionally, each of the Parties represents and warrants that it has signed this Agreement freely and voluntarily, and that in executing same, it has not been influenced by any person or entity to any extent whatsoever.

14. Independent Advice of Counsel. Each of the Parties represents and warrants that it is deliberately executing this Agreement, and that, in doing so, it is relying solely upon its own judgment, belief, and knowledge, as well as upon the advice and recommendations of its own

independently-selected counsel, concerning the terms of this Agreement as well as its rights and duties under it.

15. Interpretation of Agreement. The Parties agree that this Agreement shall be interpreted according to the plain and ordinary meaning of its terms. Additionally, the Parties agree that each of them participated equally in the negotiation and drafting of this Agreement, and consequently, no inference shall be drawn that this Agreement was prepared by any particular party and no ambiguity shall be construed against any particular party.

16. Entire Agreement. This Agreement constitutes the entire agreement of the Parties, and it supersedes any prior understandings, agreements, or representations by or among the Parties to the Agreement, written or oral, to the extent they related in any way to the subject matter of this Agreement.

17. Severability. If any provision of this Agreement is deemed to be invalid or unenforceable under applicable law, this Agreement shall be considered divisible as to such provision and the same shall thereafter be inoperative; provided, however, the remaining provisions of this Agreement shall be valid and enforceable notwithstanding.

18. Modification. No oral modification of this Agreement shall be deemed valid or enforceable under any circumstances. Instead, all modifications of this Agreement shall be in writing and signed by each of the Parties, or by their respective attorneys.

19. Counterparts. This Agreement may be executed in one or more counterparts. In this event, this Agreement shall not become effective and binding upon the Parties until such time as all of the signatories have signed a counterpart.

20. Further Assurances. The Parties shall execute and deliver any other documents

and/or instruments and shall take any other actions as may be reasonably required or appropriate to evidence or carry out the intent and purposes of this Agreement.

21. Paragraph Headings. The paragraph headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

SIGNATURES ON FOLLOWING PAGES

IN WITNESS WHEREOF, the PBA has executed this Agreement and caused its name to be subscribed as of the date indicated below.

**THE PUBLIC BUILDING AUTHORITY OF
THE CITY OF HUNTSVILLE, ALABAMA**

By: _____

Its: _____

STATE OF ALABAMA)
COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that (s)he has read and understood the foregoing release; (s)he has the authority to bind the Public Building Authority of the City of Huntsville, Alabama; and (s)he is executing same voluntarily as his own free act.

Notary Public
My Commission Expires: _____

IN WITNESS WHEREOF, Dawson has executed this Agreement and caused its name to be subscribed as of the date indicated below.

DAWSON BUILDING CONTRACTORS, INC.

By: _____

Its: _____

STATE OF _____)
COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Dawson Building Contractors, Inc.; and he is executing same voluntarily as his own free act.

Notary Public
My Commission Expires: _____

IN WITNESS WHEREOF, Bibler has executed this Agreement and caused its name to be subscribed as of the date indicated below.

BIBLER MASONRY, INC.

By: _____

Its: _____

STATE OF _____)
COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Bibler Masonry, Inc.; and he is executing same voluntarily as his own free act.

Notary Public
My Commission Expires: _____

IN WITNESS WHEREOF, Zurich has executed this Agreement and caused its name to be subscribed as of the date indicated below.

**ZURICH AMERICAN INSURANCE COMPANY
& AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY**

By: _____

Its: _____

STATE OF _____)
COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared _____, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind Zurich American Insurance Company & American Guarantee & Liability Insurance Company; and he is executing same voluntarily as his own free act.

Notary Public

My Commission Expires: _____

CITY OF HUNTSVILLE, ALABAMA

By: _____

Its: MAYOR

STATE OF _____)

)

COUNTY OF _____)

On this the _____ day of _____, 2014, before me, a notary public, in and for said county and state, personally appeared **Tommy Battle, Mayor of the City of Huntsville, Alabama**, who being placed under oath, acknowledged to me that he has read and understood the foregoing release; he has the authority to bind the City of Huntsville, Alabama, pursuant to a valid resolution passed by the City Council of the City of Huntsville, Alabama; and he is executing same voluntarily as his own free act.

Notary Public

My Commission Expires: